Territorial Foundations of the Sovereign State in East Asia

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The issue of territorial sovereignty in Asia was brought into question by European aggression, for European incursions into Asia created Asian awareness of territorial sovereignty by its very violation.[1] This essay examines processes through which governments in East Asia began to solidify their territorial foundations. Key to the transformation of Japan and China into European state forms was the legal connection between state and territory, a relationship made explicit in the bilateral treaties that Japan and China signed with the foreign powers in the nineteenth century. Although bilateral treaties were at the time standard practice between state governments, these treaties were unusual insofar as their extraterritorial provisions defined spaces of exception for foreigners in Asian lands.

These territorial exemptions reflect the nineteenth-century linkage of territorial sovereignty in international law to the privileged position of the European powers, for extraterritoriality was the condition imposed by those powers on China and other "oriental" countries because of their allegedly insufficient degree of civilization. European incursions and their lesson of territorial sovereignty pulled China and Japan in two directions. On the one hand, corollary to territorial sovereignty was the duty to protect within the territory not only the rights of other states but also the rights that each state claimed for its nationals in that territory. Japan and China needed to possess the legal and political organization capable of fulfilling this set of duties. On the other hand, Japan and China realized that they had to consolidate their respective territories, lest foreign powers claim proximate footholds that could become security threats. The fact that these processes of state formation ensued so differently in China and Japan—and produced such different results—underlines the point that a state is not a natural agent in an international world of states: it is a set of historically contingent practices.[2]

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1 See Teemu Ruskola, "Raping Like a State," *UCLA Law Review* 57, no. 5 (2010): 1531–1532.

2 Douglas Howland and Luise White, "Introduction: Sovereignty and the Study of States," in *The State of Sovereignty: Territories, Laws, Populations*, ed. Douglas Howland and Luise White (Bloomington: Indiana University Press, 2009), 1–18.

An example of this contingency is the fact that, common to international relations and international law then and now, not all decisions were formally codified by treaty. The great powers were often willing to approve gentlemen's agreements in diplomatic practice, which would effectively sanction the legality of such agreements. This essay thus presents examples of both territorial designations through treaty law and territorial claims that attained international sanction through diplomacy. In other words, this essay substantiates the point that power and legitimacy are intertwined in international law and international relations—to recall the analysis of E. H. Carr, the tension between power and rules effectively politicizes international law.[3]

International law in the nineteenth century was Eurocentric: the great powers deliberately undermined their putative vision of equality and autonomy among states, and their efforts to create a quasi-liberal world order sustained aggressive policies of imperialism and colonialism. This essay does not pursue a critique of international law and relations as experienced in "the periphery" in the nineteenth century, for others have done so already.[4] This essay does not treat territorial sovereignty as "territorial exclusivity"—a reified factor in organization analysis on the part of political scientists—which marks either the lack of sovereignty or its attainment.[5] Nor does this essay treat territory as state property, after the analysis of international lawyers.[6] Rather, territorial sovereignty—as exclusive jurisdiction within state territory—is a set of territorial practices that began to secure European-style statehood in East Asia and, modeled on those of European states, constitute the territorial foundations of sovereign statehood. They represent a goal toward which Asian governments worked within the confines of the nineteenth-century world order.

Before moving on, it may be worthwhile to note that this essay assumes two points that are treated elsewhere: First, sovereignty as a nineteenth-century European concept came to signify a state's legal claim to territory. Territorial claims prior to the coordination of international law in the

3 Phil C. W. Chan, "A Critique of Western Discourses of International Law and State Sovereignty through Chinese Lenses," *Baltic Yearbook of International Law* 15 (2015): 191–215; E. H. Carr, *The Twenty Years' Crisis, 1919–1939*, 2nd. ed. (London: Macmillan, 1946), 177–180.

4 Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2004); Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History, 1842–1933* (Cambridge: Cambridge University Press, 2014); Chan, "A Critique of Western Discourses of International Law."

5 Ja Ian Chong, *External Intervention and the Politics of State Formation: China, Indonesia, and Thailand, 1893–1952* (Cambridge: Cambridge University Press, 2012).

6 Michael J. Strauss, *Territorial Leasing in Diplomacy and International Law* (Leiden: Brill Nijhoff, 2015), 34–50.

nineteenth century were personal claims made on behalf of sovereigns, and these personal claims were eventually assumed by states as they were constructed in the nineteenth century. Sovereignty may be an assemblage of various claims or rights—including those of peoples or nations or races—but territory is the primary ground of the state as it has been constructed in the Eurocentric international order, first under the supremacy of the British Empire and then under the regimes of the League of Nations and the UN.

Second, sovereignty became associated with nationalism in the nineteenth century and the concept was formalized at the Versailles Peace Conference in the name of "self-determination." The transmission of such an idea in East Asia was facilitated by at least three factors: First, Chinese geography had long identified "peoples" linked to their homelands and such practice contributed to geographical knowledge in Japan, Korea, and Vietnam. Second, certain international law texts that coincidentally associated "nations" and "peoples" with the state (Vattel, Wheaton, Woolsey) were translated into literary Chinese beginning in the 1860s, and these were subsequently taken to Japan, Korea, and Vietnam. And third, the imagination of competing races or peoples provided by social Darwinism became, after the 1880s, a popular notion especially in Japan. Be that as it may, however much nationalism influenced the creation of states in Asia or elsewhere, territory remains the ground of sovereignty in the modern state.

Territorial claims and the doctrine of *Terra Nullius*

In the nineteenth century, two principles in international law were proposed that better enabled the great powers to justify their claims to territory and the Euro-American expansion of colonies and empires. One was "effective occupation," identified by actual settlement or the establishment of government administration. The act produced by the Congress of Berlin in 1885, for example, described effective occupation as "the establishment of authority […] sufficient to respect existing rights, and as the case may be, freedom of trade and of transit."[7] Other authorities at the time interpreted effective occupation as governmental control "sufficient to provide security to life and property."[8] A second principle that was raised to justify territorial

7 "General Act of the Conference […] Respecting the Congo, Signed at Berlin 26 February 1885," Art. 35, in Clive Parry, ed., *The Consolidated Treaty Series* vol. 165 (Dobbs Ferry: Oceana, 1969–81): 485–502. A great deal of interpretive debate ensued as to the meaning of *le cas échéant*, officially translated as "as the case may be" but equally rendered "if need be." Was freedom of trade and transit a condition of effectivity or not?

8 Norman Hill, *Claims to Territory in International Law and Relations* (London: Oxford University Press, 1945), 146–148.

claims was the doctrine of *uti possidetis* ("as each possesses"). It had originally justified the legal transfer of captured private property at the end of a war, but came to mean—with reference to statehood—that administrative boundaries become international boundaries when a colony achieves independence.[9] The doctrine appeared in the course of the revolutions in Spanish America in the early nineteenth century—as an effort to prevent European states from reclaiming American land as "effectively occupied"—and it arguably informed the process of decolonization in Africa and elsewhere during the 1950s and 1960s.[10]

The problem with the discovery and occupation of new territory had always to do with the doctrine of "vacant country" or "unoccupied territory": in the nineteenth century, this would be formalized as *territorium nullius* or *terra nullius*.[11] The doctrine was something of a misnomer, for most cases were not a matter of actually "unoccupied" or "vacant" land but the perception of a level of organization or civilization among the inhabitants. In the "age of exploration," a local leader not deemed sufficiently sovereign was induced to offer evidence of submission and obedience to the European king, which was taken for "effective control" by the sovereign

9 Historians of international law overlook an earlier history of the principle of *uti possidetis*, which developed in the eighteenth century to differentiate the territories of the Spanish and Portuguese colonial empires, both of which had disrespected the line between the two established by the 1494 Treaty of Tordesillas. The Treaty of Madrid of 1750 revoked the Treaty of Tordesillas and recognized the status quo, for the first time fixing effective possession as a norm for South America: territories were to remain "as each effectively possesses" (*uti possidetis de facto*). *Uti possidetis* thereafter developed into the more commonly understood principle that informed relations among the newly independent republics of Spanish America and Brazil and the European powers. See Jairo Ramos Acevedo, "El 'uti possidetis' un principio Americano y no Europeo," *Misión Juridica* 5 (2012): 145–163; Joshua Castellino and Steve Allen, *Title to Territory in International Law: A Temporal Analysis* (Aldershot: Ashgate, 2003), 11.

10 See Hill, *Claims to Territory in International Law and Relations*, 154–156; and Giuseppe Nesi, "*Uti possidetis* Doctrine," Max Planck Encyclopedia of Public International Law, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2018). http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1125 [Accessed March 17, 2018]. Although scholars and legal opinions routinely cite *uti possidetis* as a principle that informed the disposition of colonial territories upon their independence, Suzanne Lalonde argues that such claims are founded upon an "exaggerated assessment" of the principle and that other legal principles have been equally significant in determining borders, including state succession, *nemo dat*, and territorial integrity. (*Nemo dat quod non habet*—no one can give what he does not have—pertains to the fact that a new state has only the territory of its predecessor.) See *Determining Boundaries in a Conflicted World: The Role of* Uti Possidetis (Montreal: McGill-Queen's University Press, 2002).

11 Andrew Fitzmaurice, "The Genealogy of *Terra Nullius*," *Australian Historical Studies* 129 (2007): 1–15; and Andrew Fitzmaurice, "Discovery, Conquest, and Occupation of Territory," in *The Oxford Handbook of the History of International Law*, ed. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 840–861.

European claimant.[12] This was typically Spanish or Portuguese practice. By comparison, the French and English made formal treaties or agreements with native peoples in North America—for peace, military alliance, trade, or purchase of land—as did the Dutch in the East Indies. Although some explorers were instructed to claim any lands "not previously possessed by any *Christian prince*," the rulers of some lands in India, the Middle East, and North Africa, as well as China and Japan, were considered to possess a sovereign status of equivalent rank.[13] As Friederike Kuntz has demonstrated in her analyses of early modern diplomacy, the Ottoman sultan was treated as a sovereign equivalent to the king of France.[14] Likewise, the Chinese emperor and Japanese shogun were sovereigns in their respective lands, and no European explorer ever attempted to claim their territories as "vacant country." Negotiations and treaties were required—especially because, as I have argued elsewhere, in the persisting context of natural law, both China and Japan continued to maintain a sovereign status and were capable of acting as sovereign peers of their European rivals.[15]

In 1886—prompted by the ambiguities of the 1885 General Act of Berlin regarding Africa—international lawyer Ferdinand de Martitz proposed to redefine *terra nullius* as "land not under any sovereignty."[16] This was a controversial definition that the Institut de Droit International eventually refused to endorse. Martitz and his rival, Éduard Engelhardt, both attempted to provide some substance to the Act of Berlin, in the absence of any explanation as to what, in the eyes of the signatory powers, constituted "effective" occupation of territory in Africa. The Berlin Act maintained only that "effective occupation" required that the occupier notify the other powers and establish an authority in the occupied territory or protectorate. Engelhardt criticized the Act and its signatories for their lack of clarity, and proposed that effective occupation be understood to include the various measures also specified by the other articles of the Act: that slavery in occupied territory be abolished; that freedom of religion in occupied territory be maintained; that the rights of the indigenous people be

12 Arthur S. Keller, Oliver J. Lissitzyn, and Frederick J. Mann, *Creation of Rights of Sovereignty through Symbolic Acts, 1400–1800* (New York: Columbia University Press, 1938), 10.

13 Keller, Lissitzyn, and Mann, *Creation of Rights*, 10, 13.

14 Friederike Kuntz, "Aporias: The International Relation, Interrelated Sovereigns, the Human Individual, and Power-Knowledge" (PhD diss., University of Bielefeld, 2015).

15 Douglas Howland, *International Law and Japanese Sovereignty: The Emerging Global Order in the 19th Century* (New York: Palgrave Macmillan, 2016), 27–48.

16 Ferdinand de Martitz, "Occupation des territoires," *Revue de droit international et de législation comparée* 19 (1887): 371–376. Also see Fitzmaurice, "The Genealogy of *Terra Nullius*," 10–13.

respected; that freedom of trade and transit throughout occupied territory be maintained; and so on.[17] Martitz's definition sought to specify that territory, whether inhabited or not, was available for occupation if it were not under the sovereignty of any member of the "civilized" family of nations. Although this was a proposal tailored to Bismark's plans for German colonization in Africa, the majority of international lawyers found Martitz's proposal not only groundless within nineteenth-century international law, but also inappropriately reminiscent of the "age of exploration" and its valorization of the rights to conquest of Christian princes. In 1889, the Institut's Resolution on Occupied Territory reproduced the majority of Engelhardt's recommendations.[18] In his magisterial review of the issues, Charles Salomon concluded that, although the Berlin Conference may have produced a "uniform doctrine" concerning occupation, the position of the powers was odious and incomplete. To Salomon, the object of territorial occupation was self-enrichment and neither the Berlin Act nor the Institut's Resolution guaranteed—apart from personal property—the rights of indigenous peoples. Their care and education justified the occupier's creation of a protectorate.[19]

In this respect, Martitz was *au courant* in restricting inclusion within the family of nations to "civilized" states. The 1890s and 1900s witnessed an increasing use of international treaties to transfer titles to land—as acts of international law—but this practice was highly controversial within positivist international law as it developed its doctrine of "civilized society." Because treaties were said to express the sovereign wills of civilized rulers, if a local chieftain were qualified to sign a treaty—or at best, scratch his "X" on the appropriate line—he must be sovereign and able to transfer African lands to a European power. However, if the local chieftain were not civilized and hence not properly sovereign, the treaty was not a legitimate document and the European power could not rightfully occupy African lands ceded by an illegitimate treaty. Legal scholars raised identical questions about the legitimacy of treaties between China or Japan and the European powers—William Edward Hall, for example, asserted that neither China nor Japan was a "civilized" realm and judged all European

17 Éduard Engelhardt, "Étude sur la déclaration de la conférence de Berlin relative aux occupations," *Revue de droit international et de législation comparée* 18 (1886): 433–441, 573–586.

18 The debate is summarized in "Quatrième commission d'études: Examen de la théorie de la conférence de Berlin de 1885, sur l'occupation des territoires," *Annuaire de l'Institut de droit international* 9 (1888): 243–255; the 1889 resolution is reprinted in James Brown Scott, ed., *Resolutions of the Institute of International Law Dealing with the Law of Nations* (New York: Oxford University Press, 1916), 86–88.

19 Charles Salomon, *L'occupation des territoires sans maître: étude de droit international* (Paris: A. Giard, 1889), 189–200, 209–210, 260–274.

treaties with them to be illegitimate. Presumably, China's cession of Hong Kong to the United Kingdom was null and void. Of course, most statesmen deliberately ignored this technical contradiction, for colonial control of African lands and the stability of extraterritorial arrangements in China, Japan, Korea and the Middle East depended upon European acknowledgment of the legitimacy of their treaties.[20]

Consider a pair of examples. The current Sino–Japanese dispute over the Senkaku or Diaoyu Islands, as Unryu Suganuma and Martin Lohmeyer point out in their meticulous analyses, erupted only in 1969 with the discovery of valuable natural resources in the seabed surrounding the islands.[21] For centuries, the Diaoyu/Senkaku Islands were known to subjects of both China and Japan. The Chinese historical record confirms that during both the Ming and Qing dynasties, Chinese missions to the Liuqiu (Ryūkyū) Kingdom routinely passed by the Diaoyu/Senkaku Islands—as did Liuqiuan missions to China. Both Suganuma and Lohmeyer recount how ships routinely used the Diaoyu/Senkaku Islands as a navigational marker; thus, the islands figured on Chinese route maps. But this does not mean either that Chinese subjects "discovered" the islands or that they "claimed" the islands as Chinese territory. The islands were uninhabited and without sovereignty—*terra nullius*—a status confirmed by British naval surveys of the region beginning in 1843.[22]

Only after Japan annexed the Ryūkyū Kingdom in 1879—as Okinawa Prefecture—did Japanese authorities take an interest in the Senkaku Islands. Beginning in 1885, the governor of Okinawa Prefecture urged the Japanese government to claim the islands as Japanese territory, which it did immediately after the Sino–Japanese War in 1896, and placed them under the jurisdiction of Okinawa Prefecture. Japanese businessman Koga Tatsushirō then leased the islands for thirty years, during which time he established an expanding settlement and several businesses there, from agricultural developments to collecting guano for fertilizer and albatross feathers for women's hats.[23]

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20 Anghie, *Imperialism, Sovereignty, and the Making of International Law*, 92–96; Howland, *International Law and Japanese Sovereignty*, 14–18; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001), 138–142.

21 Unryu Suganuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands* (Honolulu: University of Hawai'i Press, 2000), 11–14, 129–131; Martin Lohmeyer, T*o Whom Belong the Diaoyu/Senkaku Islands under Public International Law?* (Berlin: Logos, 2009), 14, 83–85.

22 Suganuma, *Sovereign Rights*, 89–91; Lohmeyer, *To Whom Belong*, 55–56. On pp. 145–146, however, Lohmeyer notes the recent and anachronistic Chinese argument that China "discovered" the islands in the Ming dynasty and thereafter possessed them.

23 Suganuma, *Sovereign Rights*, 98, 118–119; Lohmeyer, *To Whom Belong*, 62–71, 141–143.

It is clear that, while China took little interest in the Diaoyu Islands, Japan settled and possessed them.

The 1951 San Francisco Treaty at the end of the Second World War—signed between Japan and the Republic of China (on Taiwan)—did not mention the islands, and the attentions of Japanese and Chinese remained elsewhere. Neither the ROC nor PRC took much interest in the UN negotiations over the UNCLOS Treaty (in force since 1994), yet Japan, in spite of its minimal participation in the UNCLOS negotiations, was the only country to veto the 200-mile exclusive economic zone, which the PRC has keenly supported since signing onto the Treaty in 1996.[24] Since 1970, however, the ROC and the PRC persist in their claims upon the islands. The situation hasn't been helped insofar as all parties —the USA, China, and Japan—have decided in the interests of entente in the present to leave the resolution of the dispute to future leaders. Historian Suganuma concludes that the Senkaku Islands have been "held hostage" to geopolitics and Sino–Japanese relations.[25] As entente has been replaced by belligerent posturing, nationalistic activists from Japan, Taiwan/ROC, and the PRC periodically invade the islands, making irredentist claims for one party or another; at the same time, political leaders denounce their opponents with references to international law. On the one hand, Lohmeyer grants legitimacy to the many and diverse legal strategies of all parties, and concludes that all are likely to fail, since each state is less interested "in resolving the problem than in having their views prevail."[26] On the other hand, Melissa Loja argues that both the ROC and PRC acquiesced in the *status quo post bellum* of Japanese possession at the end of the War, and neither government raised any opposition when it might have done so (points with which Lohmeyer concurs). The Japanese demonstrated effective occupation during the four decades that mark its two wars with China, and the islands remained Japanese possessions. Loja concludes that China lacks any legal basis for its opposition to Japan.[27] China's claim

24 Suganuma, *Sovereign Rights*, 28–32; Lohmeyer, *To Whom Belong*, 75–77.

25 Suganuma, *Sovereign Rights*, 136–139.

26 Lohmeyer, *To Whom Belong*, 218, 230–231.

27 Melissa H. Loja, "Status Quo Post Bellum and the Legal Resolution of the Territorial Dispute between China and Japan over the Senkaku/Diaoyu Islands," *European Journal of International Law* 27, no. 4 (2016): 979–1004. See also Suk-Kyoon Kim, "Perspectives on East China Sea Maritime Disputes," in *The Limits of Maritime Jurisdiction*, ed. Clive Schofield, Seokwoo Lee, and Moon-Sang Kwon (Leiden: Brill Nijhoff, 2014), 285–296.

is based on the threat of force.[28]

A second case offers a contrast as to how international law may misinform these sensitive issues. Already in the 1870s, Japan had begun to apply European international law to its relations with China and Korea; after 1909, as colonial master of Korea, Japan maneuvered in effect a "land grab" on behalf of Japan's Korean Protectorate. Japanese legal scholar and official Shinoda Jisaku, who served as a legal advisor to the Japanese Army during the Russo–Japanese War and subsequently in the Japanese administration of Korea, oversaw the maneuver. As Nianshen Song recounts, Shinoda argued that the area north of the Tumen River (Kando or Kantō in Japanese) was effectively *terra nullius* insofar as it had never been clearly under the sovereignty of either Qing China or Joseon Korea. Shinoda's argument pointed to erroneous maps drawn in the 1710s, which incorporated the fact that Koreans had deliberately misinformed Qing officials about the Qing–Joseon border, but which nonetheless became official Chinese representations of the border region. (The maps were subsequently copied by French scholars and thus became international references.) Two centuries later, when imperial Japan was interested in expanding and solidifying its position against Russia, as well as developing a "Northeast Asian transportation corridor" through the region, newly corrected maps and Martitz's legal proposal to define *terra nullius* as "land without sovereignty" provided a dubious means to demonstrate that the Kando area belonged to Korea—and hence to Japan. Because Japanese-occupied Korea served as a buffer to Russia, the UK and the other powers were content to let Japan have its way.[29] The fact that the area was secured for Korea by its colonial masters may complicate China–Korea border relations today, but China has not challenged this *status quo post bellum*.

Territorial sovereignty

These European practices of territorial claims began to transform local practices in nineteenth-century East Asia after the example of Europe, for territoriality in the nineteenth century became a question of exclusive state jurisdiction. Formal descriptions of the state and state behavior in international law texts emphasized the fundamentals of territory, and

28 Despite this pessimism, several scholars have recently proposed a variety of solutions, including Godfrey Baldacchino, S*olution Protocols to Festering Island Disputes: "Win-Win" Solutions for the Diaoyu/Senkaku Islands* (Abingdon: Routledge, 2017); and Balazs Szanto, *China and the Senkaku/Diaoyu Islands Dispute: Escalation and De-escalation* (Abingdon: Routledge, 2018).

29 Nianshen Song, "The Journey towards 'No Man's Land': Interpreting the China–Korea Borderland within Imperial and Colonial Contexts," *The Journal of Asian Studies* 76, no. 4 (2017): 1035–1058.

these became familiar to Chinese and Japanese scholars and officials in the 1860s and 1870s, as Euro-American texts of international law were translated into literary Chinese and introduced to Japan (and Korea and Vietnam). A book such as Henry Wheaton's *Elements of International Law* emphasized the immunity of state territory from foreign intrusions, and Johann Bluntschli's *Das moderne Völkerrecht der civilisierten Staaten* acknowledged a widespread definition of the state as consisting of a territory, a population, and a government.[30] In the Anglo-American world, legal positivists emphasized the sovereignty of the state, as each state strove to assert its complete jurisdiction over the criminal and civil matters of persons within its territory. Each worked to consolidate state authority over all aliens within its territory and over all its subjects at home and abroad and on its ships at sea. State control of territory came to mark a state's sovereignty—its absolute jurisdiction within its own territory.

In the face of the unfair treaties between the foreign powers and China and Japan respectively—which created extraterritorial zones and other such assaults on Chinese and Japanese sovereignty—the two governments responded quite differently. Even though Chinese officials were aware of British encroachments in India, they were slow to organize an effective strategy against the great powers of Europe. This was perhaps because of China's massive size and many land borders, because both power and government functions began devolving to the provinces during the Taiping rebellion of the 1850s, and because of the distraction of the Tongzhi palace coup in 1861. But an equally significant factor was the Chinese imperial government's longstanding accommodation of foreigners in resident communities, much like the Ottoman sultans' arrangements of "capitulations." Different in the nineteenth century, however, were the foreign powers' *legal* demands for extraterritoriality, trade privileges, and the cession or lease of territory. Ongoing conflicts and a somewhat tardy realization of the nature of the problem delayed Chinese effectiveness.

By contrast, the Meiji government in Japan immediately undertook two critical tasks. First, the Japanese worked quickly to secure Japan's borders in order to claim lands that foreign powers might construe as "unoccupied"; Japan sought to enlarge its territorial outposts so as to both keep foreigners at bay and maintain a better defensive position for the Japanese homeland. Second, the Japanese government worked assiduously to manage the confusing conditions of extraterritoriality to Japan's benefit. This involved a constant struggle with the ministers and envoys of

30 See Rune Svarverud, *International Law as World Order in Late Imperial China: Translation, Reception, and Discourse, 1847–1911* (Leiden: Brill, 2007).

foreign powers in order to force them to recognize that extraterritoriality meant only that foreign subjects would not be subjected to Japanese courts of law. Foreigners were nonetheless required to obey Japanese law when in Japan. The exceptions created by extraterritoriality did not prohibit Japan from exercising its territorial sovereignty—to make laws that governed all people in Japan. The following treats these issues in turn.

Territorial claims

Prior to the Meiji revolution of 1867, the Tokugawa shoguns had ruled over a geographically defined polity—the shogun's domain—but this was nothing like a modern state with its homogenous national territory. Rather, persons within the shogun's domain were identified by status (*mibun*), a legal ranking of persons into such groups as samurai, peasants, townspeople, outcastes, and more. Moreover, the members of each different status group occupied different spaces within the shogun's domain: most exceptional of these were the regional lords' domains, Shinto and Buddhist religious institutions, and outcaste villages—all of which were largely self-governing units. This polity extended from the domain of Japan, under the authority of the shogun, to groups at the peripheries identified as "barbarian": the Ainu in Hokkaidō to the north, and the Ryūkyūans to the south. The Meiji decision to reconstruct this polity after 1868 pursued two crucial policies: first, the elimination of status in 1871 began the work of re-identifying all persons as Japanese subjects of the Japanese emperor. This process of social homogenization was extended to the Ainu and Ryūkyūans, as the island of Hokkaidō and the new prefecture of Okinawa were integrated into the new Japanese state. Second, an 1873 decree eliminated internal autonomies, such as lords' domains and outcaste villages, and was accompanied by the creation of a national territory divided into prefectures and governed from the new imperial capital in Tokyo. That new homogenous territory of Japan, in which national laws applied to all subjects of the Japanese emperor, was the space of Japanese imperial rule.[31]

To be sure, another significant piece of this reconstruction of Japan was the creation of a Japanese nation, defined more in terms of the characteristics of the people than by territory; but this modern space of the nation corresponds

31 David L. Howell, "Territoriality and Collective Identity in Tokugawa Japan," *Daedalus* 127, no. 3 (1998): 105–132, and David L. Howell, *Geographies of Identity in Nineteenth-Century Japan* (Berkeley: University of California Press, 2005), 1, 4–8, 22, 151, 198.

to the internal realm of Japan.[32] The external realm was defined by the territorial sovereignty of the Japanese state, and Japan constructed its new state deliberately in order to create a set of domestic and international institutions that would assert Japan's equality with its Euro-American tutors who defined the international community. Within that community, Japan's statehood was defined territorially, even if extraterritoriality temporarily undermined Japan's sovereignty over that territory.

Because of the extraterritorial provisions of the unfair treaties of the 1850s and 1860s, Japan realized that it must consolidate its territory, lest foreign powers claim proximate footholds that became security threats. The Japanese government immediately began to secure Sakhalin and the Kurile Islands, the Ogasawara (Bonin) Islands, and the Ryūkyū Islands as Japanese territory.[33] Sakhalin—or Karafuto—had been an ambiguously Russo-Japanese possession after 1855, but an 1875 treaty with Russia granted the island to Russia in return for Japanese possession of the Kurile Islands. The Ogasawara Islands, by diplomatic agreement with the UK and the USA, were recognized internationally as a Japanese possession in 1875; British Minister to Tokyo Harry Parkes informed the English residents of the Bonin Islands that Japan had assumed sovereignty over the islands.[34] As we have seen, the Ryūkyū Kingdom conducted tributary relations with Ming and Qing China, as well as extensive trade with the Satsuma domain during the Tokugawa period. In 1874, Japan declared the islands to be Japanese territory, and the Taiwan Incident (or Formosan Expedition) began a fitful process of eliminating Chinese objections. In 1879, with the encouragement of the USA and willingness of the UK, Japan's claim over the island chain was legitimized and Okinawa Prefecture was created.[35]

More demanding was Japan's effort to convince the international community that Japan's Inland Sea was in fact Japanese territorial water.

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32 Kevin M. Doak, *A History of Nationalism in Modern Japan* (Leiden: Brill, 2007), 6–11, 32–35; and Stefan Tanaka, *New Times in Modern Japan (*Princeton University Press, 2004), 48–53, 83–84. An explanation of the internal and external aspects of state sovereignty was featured in Wheaton's *Elements of International Law*, available to Japanese scholars in the 1860s in Chinese translation, see Svarverud, *International Law as World Order*.

33 Kanae Taijudo, "Japan's Early Practice of International Law in Fixing its Territorial Limits," *Japanese Annual of International Law* 22 (1978): 1–20; Kawasaki Takako, "Nihon no ryōdo," in *Nihon to kokusaihō no hyakunen*, vol. 2, *Riku – kū – uchū*, ed. Kokusaihō gakkai (Tokyo: Sanseidō, 2001), 95–126; Kamikawa Hikomatsu, ed., J*apan-American Diplomatic Relations in the Meiji-Taisho Era* (Tokyo: Pan-Pacific Press, 1958), 81–82, 98–106; Masaharu Yanagihara, "Japan," in *The Oxford Handbook of the History of International Law*, ed. Fassbender and Peters, 474–499.

34 See Derby to Parkes, March 8, 1877, in Great Britain, The National Archives, Foreign Office File F.O. 262/301: [78].

35 George H. Kerr, *Okinawa: The History of an Island People* (Rutland, VT: Tuttle, 1958). Japan and China continued to negotiate until January 1881, when Japan broke off negotiations.

The question was raised during a legal case that arose from an 1892 maritime collision between a British steamship and a Japanese naval vessel in the Inland Sea. The British company's appeal in the case—known as *Government of Japan v. P & O Steamship Co.*—argued that the Inland Sea was a public highway because foreign vessels, under the arrangements of extraterritoriality, had "rights of passage" through the Inland Sea in order to reach the "open" treaty port of Kōbe. Therefore, the company argued, the sea was international water. Japan insisted to the contrary that the Inland Sea was Japanese territorial water, and defended its position with legal definitions of territorial waters, as well as the wording of Japan's 1870 Act of Neutrality (prepared during the Franco–Prussian War). Kaneko Kentarō presented that judgment before the Institut de droit international in March 1894, and the Japanese government officially decreed in March 1896 that the Inland Sea was Japanese territorial water. The Japanese Foreign Ministry thereupon sent a diplomatic note to that effect to both the British minister in Tokyo and the British Foreign Office; the British government acquiesced in that disposition, and the other naval powers followed suit.[36]

Unlike Japan, China had negotiated an "equal treaty" with a European power already in the seventeenth century—the famous 1689 Treaty of Nerchinsk with Russia—and conducted trade negotiations with the Portuguese and the Dutch at the imperial court.[37] While Chinese scholars argue that these activities represent early Chinese attempts to assert a modern form of sovereignty, I would instead consider these acts as prerogatives of monarchy: the Qing Emperor sought to maintain his sovereign authority over his dynastic territory. If anything, European trade policy became an ominous warning for nineteenth-century scholars such as Wei Yuan, who sounded the alarm to his fellows over the expansionist policies of European monarchs and corporations—especially the fate of India under increasing British domination.

The 1842 cession of Hong Kong to the United Kingdom was irksome, but the imperial Chinese government grew ever more outraged by the persistent demands of the European powers for diplomatic representation in Beijing, the right to proselytize Christianity in rural areas, and increased trade and territorial privileges. Diplomatic conflict led to military conflict in the

36 Douglas Howland, "International Law, State Will, and the Standard of Civilization in Japan's Assertion of Sovereign Equality," in *Law and Disciplinarity: Thinking Beyond Borders*, ed. Robert J. Beck (New York: Palgrave Macmillan, 2013), 196–199.

37 Chi-Hua Tang, "China–Europe," in *The Oxford Handbook of the History of International Law*, ed. Fassbender and Peters, 704. See also John E. Willis, Jr., "Ch'ing Relations with the Dutch," in *The Chinese World Order*, ed. John King Fairbank (Cambridge: Harvard University Press, 1968), 225–256.

1850s and 1860s, in which China was not able to defend its interests and was forced to sign new unequal treaties.[38] Further territorial cessions followed: with the 1860 Treaty of Beijing, for example, the UK demanded that China cede the Kowloon Peninsula, which had theretofore been leased in perpetuity to Minister Harry Parkes on behalf of the British monarch.[39]

However, Chinese officials at the Zongli Yamen ("Foreign Office") realized the significance and utility of international law as they resolved a dispute with Prussia in 1864 concerning China's territorial waters. In the course of the Second Schleswig War (or Danish–Schleswig War) raging in Europe, the new Prussian minister illegally seized three Danish merchant vessels in neutral Chinese waters as war prizes. The Zongli Yamen invoked their new Chinese translation of Wheaton's *Elements of International Law* both to charge the Prussians with violating Chinese territorial waters and to successfully force Prussia to compensate the Danish government for damages.[40]

Subsequently, in the 1870s and 1880s, the Chinese government pursued active negotiations with Russia, France, and the UK in order to secure its borders in Central Asia and Manchuria (Russian Siberia), Southeast Asia (French Indochina), and Burma and Tibet (British India). To validate its claims along the Yunnan–Burma border, for example, Chinese authorities sent an exploratory mission under the direction of Yao Wendong to map the border; his findings informed China's negotiators on the Delimitation Commission established in 1886, which then defined and redefined the border in the conventions of 1894 and 1897.[41] A comparable initiative was the raising of certain territories to the status of province. For example, the peculiar ambiguities created by the Sino–French dispute of 1884–1885—never officially declared a war—encouraged China to elevate the island of Taiwan to the status of province; this act removed the island from the local provincial administration of Fujian and placed

38 See Dong Wang, *China's Unequal Treaties: Narrating National History* (Lanham: Lexington Books, 2005).

39 "Convention of Peace Between Her Majesty and the Emperor of China" (Art. VI), in William Frederick Mayers, ed., *Treaties Between the Empire of China and Foreign Powers* (Shanghai: North China Herald, 1877), 8–10.

40 Tang, "China–Europe," 705; Wang Tieya, "International Law in China," *Recueil des Cours* 221 part 2 (1990): 232–234.

41 Yao Wendong prepared the text of *Yunnan kanjie choubian ji* between 1887 and 1889 but it was not published until 1891, and was then frequently reprinted in the 1890s. The Anglo–Chinese conventions regarding the Chinese border with Burma are assembled in Godfrey E. P. Hertslet, ed., with the assistance of Edward Parkes, *Treaties, &c., Between Great Britain and China; and Between China and Foreign Powers, and Orders in Council, Rules, Regulations, Acts of Parliament, Decrees, &c., Affecting British Interests in China*, 3rd. ed. (London: Harrison and Sons, 1908), vol 1: 88–90, 99–109, 113–118.

it more securely under the direct management of the imperial government. Xinjiang too was made a province in order to better secure its borders with Russia in the vast expanse of "Turkestan."[42]

The Chinese government, in other words, had become sufficiently competent in international law to be able to use it to defend China's territorial borders. Likewise, Chinese officials effectively employed the doctrine of the national territoriality of ships at sea to defend itself in the sinking of the *SS Kaoshing* at the start of the Sino–Japanese War in 1894. The British steamship had been leased by China in order to transport troops to Korea, but a Japanese gunboat sank it in violation of British neutrality. In spite of the soundness of, and international support for, China's arguments, they were rejected by British officials in the Foreign Office, who were committed to Japan's position in the case.[43]

To the detriment of these efforts to define and defend China's borders, a barrage of additional concessions and privileges in Chinese territory exploded in 1898. Lest any state receive an advantage over any other, as Japan appeared to have done in the wake of the Sino–Japanese War, the powers all made demands for special privileges in respective parts of China: Russia in Manchuria, Germany in Shandong, the UK in the Yangzi valley, France in the southwest. In addition, they demanded concessions to construct railroads and telegraph lines, and to develop mining and lumber industries—the Chinese granting of which was fueled by the huge indemnities that concluded its peace agreements. The Chinese government was simply unable to restrain the foreign powers at century's end, and many of these concessions were reversed only when territorial jurisdiction was secured after the establishment of the PRC in 1949. Yet some territories continue to disturb geopolitics today. Although Macao and Hong Kong returned to the PRC in the 1990s, the case of Taiwan remains controversial. China ceded the island to Japan in 1895, and the 1943 Cairo Declaration indicated the Allies' wish to return all of Japan's "stolen territory" to the Republic of China. But the Communist revolution in 1949, followed belatedly in 1951 by the peace treaty between the ROC and Japan, has left the status of Taiwan ambiguous and contentious to this day. The PRC and its allies see Taiwan as Chinese territory.[44]

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42 Shin Kawashima, "China," in *The Oxford Handbook of the History of International Law*, ed. Fassbender and Peters, 468–469. On the Sino–French dispute, see Douglas Howland, "Japanese Neutrality in the Nineteenth Century: International Law and Transcultural Process," *Transcultural Studies* 1 (2010): 14–37, esp. 24–28.

43 Douglas Howland, "The Sinking of the *S.S. Kowshing*: International Law, Diplomacy, and the Sino–Japanese War," *Modern Asian Studies* 42, no. 4 (2008): 673–703, esp. 690–694).

44 Phil C. W. Chan, *China, State Sovereignty, and International Legal Order* (Leiden: Brill Nijhoff, 2015), 179–216.

International leaseholds

A corollary to the asserting of territorial claims in East Asia was the signing of international leaseholds—the renting of foreign territory in accord with the legal principle that a state's sovereignty over its territory includes the right to temporarily alienate territory. The typical international lease was contracted between two states for the benefit of the lessee state, and was an alternative more honorable than theft and more peaceable than war. Although the UK is usually credited with having begun the practice by leasing Kowloon Peninsula after 1842, China first leased the island of Macao to Portugal in 1535.[45] Nonetheless, when they discuss international leaseholds, jurists typically cite the flurry of leases signed by China with foreign states in the 1890s—even though these coincided with a widespread surge of leasing activity between 1875 and 1903, according to Michael J. Strauss.[46] Russia, for example, leased parts of the Liaodong Peninsula in order to have a naval station close to its eastern frontier; the UK leased Weihaiwei in order to have a naval base near Beijing, Korea, and Japan; and France leased part of Guangzhou Bay in order to have a naval base between southern Chinese ports and its Indochina colony.[47]

If the international leasehold was a treaty freely contracted between states, the more problematic variant was the "lease in perpetuity" based on the principle of extraterritoriality and included in the "unequal" treaties of the mid-nineteenth century. Leases in perpetuity set aside territory in Shanghai, Yokohama, and the other treaty ports for the benefit of foreign residents in China and Japan. The great powers negotiated with China or Japan on behalf of their respective residents in order to establish a foreign settlement and, subsequently, the residents or their representatives dealt directly with the government of China or Japan in fulfillment of the rental agreements of the lease.[48]

45 Strauss notes that the history of the Macao lease is at best "murkey" because no texts survive. The 1535 arrangements were repeatedly revised, then neglected, and Portugal claimed sovereignty over Macao in 1822, a status not recognized by the Chinese government until 1887. See *Territorial Leasing*, 58–61.

46 Strauss, *Territorial Leasing*, 70–74.

47 J. H. W. Verzijl, *International Law in Historical Perspective*, vol. 3, *State Territory* (Leiden: Sijthoff, 1970), 400–404; C. Walter Young, *The International Legal Status of the Kwantung Leased Territory* (Baltimore: Johns Hopkins University Press, 1931), 97–104; Strauss, Territorial Leasing, 74–80. These treaties are conveniently assembled in John V. A. MacMurray, comp., *Treaties and Agreements With and Concerning China, 1894–1919*, vol. 1, *Manchu Period* (1894–1911) (New York: Oxford University Press, 1921).

48 Strauss, *Territorial Leasing*, 67–69, 117–121.

But jurists have questioned the nature of leases in perpetuity as international law. Because the beneficiary of the lease is the foreign resident community, some jurists treat a lease in perpetuity as a "purely private law conception." Verzijl, for example, rejected such a lease from consideration because it is not a "genuine international lease" and has something of a more "private law nature." He thus foregrounds the Chinese cases of 1898.[49] Whatever the legal nature of the lease—whether a lease in perpetuity or a proper international lease—the rights transferred by the lease could only be specified in a treaty and jurists were unanimous that the treaty determined all rights transferred by the lease. The defining aspect of a lease was that it was not a cession of territory; it transferred not sovereignty but only aspects of jurisdiction. As Oppenheim argued, the lessee state might treat the leased territory as its own territory and a lease might resemble cession, but the territory legally remained the property of the leasing state, and the lease may end by virtue of a time limit or an act of rescission.[50] Leases, in sum, were concluded with the mutual understanding that the territory leased remained the possession of the lessor.

Japan's efforts to eliminate the leases in perpetuity in Japanese treaty port settlements led to one of the first cases to go before the International Court of Arbitration in 1902. When Japan renegotiated its unfair treaties in 1894, it assumed that the revised treaties put an end to all aspects of extraterritoriality—the treaty ports and foreign settlements were returned to Japanese jurisdiction. But the UK, France, and Germany argued instead that the clause stating that standing leasehold arrangements would continue meant that Japan could not levy taxes on the property of the leaseholds or any buildings erected on that land. The dispute became known as *The Japan House Tax Case* and its arbitration, which ruled against Japan, was widely denounced as an unwarranted persistence of privilege and miscarriage of justice. Only in the midst of the Second World War were foreign residents finally willing to relinquish their leaseholds.[51]

As in Japan, the question of China's leases in perpetuity with the foreign populations in the treaty ports was tied to a revision of China's unequal treaties. Unlike Japan, however, China faced unrelenting unwillingness on the part of the powers to revise these treaties, and China was never able

49 Verzijl, *International Law in Historical Perspective*, vol. 3, State Territory, 397.

50 Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (London: Longmans, Green & Co., 1927), 181–182.; Lassa Oppenheim, *International Law: A Treatise*, 3rd. ed. (London: Longmans, Green & Co., 1920), vol. 1, Peace: 378–379; Strauss, *Territorial Leasing*, 5–27. See also Wang Tieya, "International Law in China," 306–311.

51 Douglas Howland, "The Japan House Tax Case, 1899–1905: Leases in Perpetuity and the Myth of International Equality," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 75, no. 2 (2015): 413–434.

to force them to consider revisions, as Japan had done. Persisting conflict between China and the foreign powers—the Second Opium War, the Sino–French dispute, and the Boxer Rebellion—added new unequal treaties with new indemnities and privileges for foreigners in China. Only in the twentieth century did the situation change, especially after Chinese anger exploded in the wake of the Versailles Peace Conference, where the great powers allowed Japan to inherit former German leaseholds and concessions in Shandong. Although the concessions were returned to China in 1921, Chinese attitudes were by that point transformed. In the 1920s—and as an affront to the great powers—the Republic of China accepted the Soviet Union's offer to unconditionally relinquish all treaty privileges in China negotiated by the former Russian Tsar's government. But all of China's ongoing efforts to renegotiate its unequal treaties with European powers during the 1920s and 1930s failed, first because of European unwillingness or indifference and then because of the distraction of Japan's violent encroachments into China.[52] The leaseholds in China's treaty ports persisted into the Second World War, until China negotiated the end of its unequal treaties and Euro-American extraterritorial privileges in 1943. The Japanese occupation of much of the east coast of China rendered foreign privileges there irrelevant.

Extraterritoriality

Implicit in the preceding discussion is the fact that extraterritoriality posed an enduring problem in Japan's and China's respective relations with the Euro-American powers from the start. The principle of extraterritoriality, which informed the unfair treaties, was the claim of a foreign exemption from territorial sovereignty. As expressed in the treaties, it encompassed consular jurisdiction, the establishment of autonomous foreign settlements (leases in perpetuity), and the loss of tariff freedom—for the foreign powers reserved the right to determine all tariffs on imports and exports. Consular jurisdiction was the treaty powers' legal basis for the immunity of their subjects from Chinese or Japanese prosecution; rather than submit foreign residents to local judicial proceedings, local authorities were obliged to turn a foreign criminal offender over to the consul of his nationality. But extraterritoriality encouraged further privileges that subjects of the treaty powers erroneously claimed in China and Japan. These alleged privileges of extraterritoriality—such as the "right" to travel freely or to hunt—arose from the putative immunity of resident foreigners from Chinese or Japanese sovereignty and the impunity with which they disregarded Chinese or Japanese laws and customs.[53]

52 Tang, "China–Europe," 706–711; Chan, *China, State Sovereignty, and International Legal Order*, 79–84.

53 Howland, *International Law and Japanese Sovereignty*, 49–51.

There was a crucial difference, however, between the privileges of foreigners in China and Japan respectively. Chinese practice had been quite generous in the first centuries of Qing rule, for the Chinese emperor typically granted a measure of extraterritoriality to foreign merchants. In addition to Mongols and Manchus, the Russian and Portuguese communities had their own respective communal laws and jurisdictions within China under the authority of a leader responsible for maintaining order within the community. But expatriate foreigners were still obliged to obey Chinese law—the Opium War, recall, began when Chinese officials punished British smugglers for their crimes against Chinese law.[54]

Under duress after the Opium War, however, the Qing government initially sought to confine foreigners to the treaty ports. The Treaty of Wangxia with the USA in 1844, for example, stipulated that

> The citizens of the United States are permitted to frequent the five ports of Kwangchow, Amoy, Fuchow, Ningpo and Shanghai, and to reside with their families and trade there, and to proceed at pleasure with their vessels and merchandize to and from any foreign port and either of the said five ports, and from either of the said five ports to any other of them.[55]

But as a result of negotiations with the UK and the other powers after the Second Opium (or Arrow) War, the 1858 Tianjin Treaty granted to foreigners the privilege to travel into the interior, to proselytize Christianity, and to purchase land and buildings in the countryside.[56] The presence of foreigners in China, however, who felt superior to and hence unrestricted by Chinese law, provoked misunderstanding and conflict. Missionary facilities were frequent targets of suspicion on the part of local Chinese. Rumors that foreigners mutilated children and used their blood and organs prompted an anti-Christian riot at a French orphanage in Tianjin

54 Pär Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (New York: Oxford University Press, 2012), 15–29, 36–38, 40–47; Yongjin Zhang, "Curious and Exotic Encounters: Europeans as Supplicants in the Chinese Imperium, 1513–1793," in *International Orders in the Early Modern World*, eds. Shogo Suzuki, Yongjin Zhang, and Joel Quirk (Abingdon: Routledge, 2014), 55–75.

55 "Treaty of Peace, Amity, and Commerce between the United States of America and the Chinese Empire" (Art. III), in Mayers, ed., *Treaties Between the Empire of China and Foreign Powers*, 76–83.

56 "Treaty of Peace, Friendship, Commerce, and Navigation Between Her Majesty the Queen of Great Britain and Ireland and the Emperor of China" (Art. X), in Mayers, ed., *Treaties Between the Empire of China and Foreign Powers*, 11–20. One of the few unsettled disagreements I have encountered in the diplomatic record was whether or not foreign ships were free to navigate all internal waters of China. See "Extract from Dispatch of Alcock to Medhurst," as enclosure in *Terashima to Parkes*, 20 December 1873, in F.O. 881/2504: 29–30.

in 1870. This provoked an international incident, but more than two decades later, the murder of two German missionaries in Shandong in 1897 became the pretext for the occupation of Jiaozhou by German naval forces, and Germany subsequently demanded and received the lease of Jiaozhou for ninety-nine years.

Moreover, the preferred solution to foreign suspicions of Chinese jurisdiction, the "Mixed Court," particularly undermined Chinese sovereignty. Consular jurisdiction meant that a crime committed by a foreigner in China or Japan was to be under the jurisdiction of the national consul; so, for example, a British defendant was tried by the British consular court. Chinese defendants were always subject to the jurisdiction of Chinese courts. But the Mixed Court, composed of both foreign and Chinese judges, was intended both to tutor the Chinese in European justice and to comprehend the many foreign nationalities in Shanghai and the other treaty ports. However, it came to try cases involving Chinese subjects only and thereby usurped Chinese judiciary functions that should never have come within its purview.[57] In 1902, China finally received some assurance of an end to extraterritoriality when the British pledged "to give every assistance to such [judicial] reform" and to "be prepared to relinquish her extra-territorial rights when she is satisfied that the state of the Chinese laws, the arrangement for their administration, […] warrant her in so doing."[58] Note, however, that such an understanding had accompanied the initial treaties between Japan and the foreign powers; moreover, the Japanese had seen the dangers of the Mixed Court and had thwarted its creation in Japan.[59]

Having learned from the experience of China, Japan looked on the freedom of foreigners with great apprehension and sought to restrain foreign residents' freedom of movement in Japan. Largely because of the ferocious violence of samurai opponents to foreign relations after 1856, and because the shogun was unable to guarantee the safety of foreigners in the Japanese countryside, the UK and the other powers agreed in their treaties with Japan that foreign residents in Japan would be confined to the treaty ports. But as peace was restored after the Meiji revolution, foreigners chafed at the restrictions; merchants wanted to travel in the countryside in order to make direct contact with Japanese suppliers,

57 Wang Tieya, "International Law in China," 254–256; Cassel, *Grounds of Judgment*, 66–84.

58 "Treaty between Great Britain and China respecting Commercial Relations, &c. [Art. XII]," in Hertslet, ed. *Treaties &c., Between Great Britain and China*, 182.

59 Howland, *International Law and Japanese Sovereignty*, 43–45, 66; San'eki Nakaoka, "Japanese Research on the Mixed Courts of Egypt in the Earlier Part of the Meiji Period in Connection with the Revision of the 1858 Treaties," *Jōchi Ajia-gaku* [Journal of Sophia Asian studies] 6 (1988): 11–47.

and missionaries wanted to freely spread their teachings—as they could in China.

However, it was the foreign residents' confusing of extraterritoriality and consular jurisdiction that created legal havoc and official discord between foreigners and Japanese authorities in the 1860s. Foreigners' claims to immunity from Japanese law so outraged the Japanese government that, during the 1870s, it concentrated on eliminating this foreign misunderstanding of extraterritoriality. As Japanese officials emphasized, Japan had given up only its judicial jurisdiction by treaty—its legislative jurisdiction over foreign residents remained intact. But from the autonomous spaces of the treaty port settlements, foreigners demanded the right to travel freely throughout Japan, to hunt in the countryside, to settle within the interior of the country, and more.[60] Although these were repeatedly declared to be rights, the legal language of the nineteenth century insisted on pairing rights with duties. Presumably a right to travel into the interior of Japan would be matched with a duty to conduct oneself according to Japanese law while in the countryside of Japan. A right to hunt in Japan would be matched with the duty to carry a hunting license and obey the regulations as to when, where, and what defined the season. But no such duty was clear to foreigners. Because of the extraterritorial principle that informed their residence in Japan, foreigners misperceived themselves as immune to Japanese law and its enforcement. They imagined that when they sojourned in Japan, it was as though they were at home in their native lands.[61]

Japan was successful in its quest, for a series of scandals eventually embarrassed the diplomatic community into honoring Japan's position. In the celebrated Middleton case, American John Middleton shot the Japanese policeman who attempted to apprehend him as he was illegally hunting—only to be acquitted by a consular court. In the *Bankoku shinbun* incident, British newspaperman J. R. Black was arrested and his press confiscated for publishing a newspaper in the Japanese language. The Japanese government prohibited foreigners from publishing Japanese newspapers, because it feared that foreigners could be duped into spreading seditious propaganda for the "people's rights" advocates; the British government had to agree. Hence, by 1879, the foreign powers made a point of notifying their residents in Japan that they were obliged to obey Japanese laws: Japanese territorial sovereignty was affirmed and consular jurisdiction

60 Ōyama Azusa, *Kyū jōyaku ka ni okeru kaishi kaikō no kenkyū* (Tokyo: Otori shobō, 1967); and Sumiyoshi Yoshihito, "Nihon ni okeru ryōjisaiban seido to sono teppai," *Hōritsu ronsō* (Meiji daigaku) 43, no. 1 (August 1969): 23–74.

61 Cassel argues that the situation in China was far less clear as to whether foreign residents were required to obey Chinese law or not. See *Grounds of Judgment*, 85–94.

was returned to its narrow definition specified in the treaties. Should a foreigner wish to hunt in Japan, he had to possess a hunting license; should a foreigner wish to travel through Japan, he or she could do so only with an official passport.[62]

Conclusions

Violations of Asian sovereignty on the part of European states and persons made explicit the legal relation between territory and sovereignty in the nineteenth century. This is not to assert that, prior to the intrusions of Europeans into Chinese and Japanese territory, China or Japan had no sense of their own territories or something akin to territorial sovereignty. Rather, the practices of treaty making, extraterritorial foreign settlements, cessions and leases of land, and consular jurisdiction conspired to place a new layer of meaning upon territory and the sense of "home-land." Territory became the legal ground of the modern state and thereby, the homogenized territory marking a "nation state" or, in the case of the PRC, a multinational "people's state."

Japan successfully opposed Euro-American aggression in the nineteenth century, by developing the legal and political organization needed to impose jurisdiction within its own territory. Japan thereby became one of the great powers and pursued its own agenda of colonialism in China and East Asia. China, by contrast, struggled well beyond the collapse of its imperial government and endured foreign impunity until the 1949 revolution. Only then did China begin to reverse those earlier violations of Chinese territorial sovereignty. Yet geopolitics today remain unsettled in East Asia. Japan never ended its war with the Soviet Union; as a result, it remains in dispute with Russia over the Kurile Islands. The Korean Peninsula is divided between two opposed states, and Taiwan's future is unclear. Meanwhile, we witness the challenge that China poses to international law and international relations as it recovers its status as a world power.

The transition from sovereign to sovereignty has produced multiple effects on current analyses within international law, political science, and international relations. When scholars today discuss sovereignty as "legitimate dominion" within a territorially defined state, they re-map the powers of a monarch onto the contemporary state form.[63] The sovereign is indeed connected to sovereignty, and this is why the figure of the king historically informs that of the state—recall Hobbes's famous frontispiece

62 See Douglas Howland, "An Englishman's Right to Hunt: Territorial Sovereignty and Extraterritorial Privilege in Japan," *Monde(s): histoire, espaces, relations*, no. 1 (2012): 193–211; and Howland, *International Law and Japanese Sovereignty*, 49–72.

63 Joan Fitzpatrick, "Sovereignty, Territoriality, and the Rule of Law," *Hastings International and Comparative Law Review* 25 (2002): 303–340, esp. 308–309.

to *Leviathan*. But that was centuries ago, and today, such an approach to sovereignty muddles more than it helps. Does the state, like the king, have legitimate power over objects or property in its domain? To agree so readily encourages both the political scientist in his or her organizational analysis to reify "territorial exclusivity" as a mark of sovereignty, or the international lawyer to describe territory as the personal property of a state. This essay instead speaks of a state's exclusive jurisdiction within its territory as a necessary goal. For this latter strategy allows us to begin to understand the processes of asserting jurisdiction within state territory. As the state obtains exclusive jurisdiction within its territory, the state achieves its sovereign and territorial basis. This, I argue, is the essence of sovereign statehood today.

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